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IN THE

Supreme Court of the United States

OCTOBER TERM—1934.

No. 211.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Petitioner,

against

WESTCHESTER SERVICE CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF THE DEFENDANT BELOW, RESPONDENT IN THIS COURT

ERNEST E. WHEELER,
RALPH ROYALL,
W. CHANTLER ARBUCKLE,
BARTOW H. HALL,
Counsel for Respondent.

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SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE, *Petitioner,* *against* WESTCHESTER SERVICE CORPORATION.	No. 211

BRIEF ON BEHALF OF THE DEFENDANT BELOW, RESPONDENT IN THIS COURT

Statement

The petitioner on writ of certiorari, seeks to review an order of the Circuit Court of Appeals for the Second Circuit, granting the defendant's motion for a stay of the action pending arbitration and reversing an order of the District Court for the Southern District of New York denying the stay. The opinion of the Circuit Court of Appeals is reported in 70 F. (2d) 297 and is printed at pages 73-80 of the record. The opinion of the District Court is not officially reported and is printed in the record at pages 61-63.

The respondent before answering moved for a stay pending arbitration (R., 19-20) which motion Judge Bondy denied with leave to renew, on the ground that it was premature (R., 17-18).

The defendant served its answer on the 27th day of July, 1933, and thereafter renewed its motion for a stay pending arbitration upon the pleadings (R., 3-14) and upon the affidavits and papers submitted upon the former motion for the same relief, and upon an affidavit setting forth the proceedings already had (R., 15-40). This motion came on to be heard simultaneously with a motion by plaintiff to strike out the second separate defense which pleaded the arbitration agreement (R., 17-18).

The second cause of action (R., 7-10), to which this appeal alone refers[1] and which we will hereinafter describe as the complaint, is based upon a written agreement, not, however, attached or pleaded *in haec verba.* The agreement forms part of the moving papers and is printed in full (R., 26-32). The arbitration clause in this agreement (R., 31), and upon which the motion for a stay is based, is as follows:

> "TENTH: In case any dispute should arise between the Buyer and the Seller as to the performance of any of the terms of this agreement, such dispute shall be arbitrated and the cost thereof shall be borne equally by both parties. The Buyer and the Seller shall each appoint one arbitrator and the two arbitrators so appointed shall select a third arbitrator and the decision of a majority of the three arbitrators shall be final and conclusive on both parties. In case for any reason any such arbitration shall fail to proceed to a final award, either party may apply to the Supreme Court of the State of New York for an order compelling the specific performance of this arbitration agreement in ac-

[1]The first cause of action was dismissed by the District Court on July 18th, 1933. The order of dismissal was affirmed by the Circuit Court of Appeals without opinion and a writ of certiorari denied. (No. 101 October Term, 1934).

> cordance with the arbitration laws of the State of New York."

Judge Woolsey denied the motion for a stay (R., 61-63) on the ground that the foregoing clause, although "somewhat inartistically worded" is an arbitration agreement between the parties to be enforced by the New York State Courts under the New York State Arbitration Statute. He also held that such an agreement does not constitute a defense to an action brought in the Federal courts and granted plaintiff's motion to strike out the Second defense which pleaded the arbitration clause.

Judge Woolsey hazarded the suggestion (R., 63) that the New York State courts might under the New York Act, include an injunction or stay against proceeding with litigation in any other form—whether federal, state or foreign.

The Circuit Court of Appeals in reversing the District Court expressly refrained from construing the arbitration clause in the agreement as to whether the language employed, exclusively selected the New York Statute and Courts for the enforcement of the agreement to arbitrate. That court said:

> "We do not find it necessary to decide whether the arbitration clause at bar was limited to a proceeding in the state court. While it is certainly possible to read the language only as an addition, redundant because already provided by law, and as not intended to prevent arbitration elsewhere, we are content to treat it as exclusive, as the judge did" (R., 75).

Thus assuming, but not deciding, that the parties had exclusively selected the New York forum and law, the court granted the stay under Section 3 of the Federal Act.

The action is for damages for an alleged breach of a written contract (R., 26-32) between the plaintiff (Seller) and the defendant (Buyer) for the shipment and delivery of 75,000 gross tons of coal over a period of not less than three nor more than five years. The shipment was from Pennsylvania to Yonkers, New York (R., 27, 78), and therefore had to do with commerce between the States (Opinion; R., 77).

The contract was made on the 22nd day of January, 1931 (R., 26), and at the time of the commencement of this action, February 23, 1933 (R., 2), had about three years still to run. Although the contract is directly with the seller the damages are for prospective loss of *commissions* for the whole 75,000 tons less the amount already delivered (R., 9). No fixed price for this coal is set in the contract. The price is the "Seller's circular prices at the time of shipment," but not higher than the average circular prices of three coal companies named in the contract (R., 28-29).

On the 3rd of January, 1933, the defendant gave an order under the contract for the shipment of seven cars of coal (R., 22). The petitioner refused to fill this order (R., 36), except on condition that the acceptance of the order would not be deemed a waiver of any rights the petitioner had at that time. This refusal was shortly followed by a letter to respondent from petitioner's attorneys dated January 10, 1933 (R., 37-38). Further conversations followed (Affidavit of Elkind; R., 39-40), and on February 23rd, in disregard of the arbitration clause in the agreement, petitioner began this action. The respondent then made its first motion for a stay (Supporting affidavits, verified March 24, 1933; R., 25 and 40), which was denied as premature.

It thus appears that the petitioner has ignored the provisions of the agreement for arbitration by bringing an action, has brought the action in the Federal court, and now claims that the State courts, under the agreement, have exclusive jurisdiction to enforce the arbitration clause and that the Federal courts are powerless even to grant a stay pending arbitration.

The language employed in the Federal and New York arbitration acts is almost identical. The United States Arbitration Act contains the following provision:

> "Sec. 3. STAY OF PROCEEDINGS WHERE ISSUE THEREIN REFERABLE TO ARBITRATION. If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration" (9 U. S. C. A. §3).

The Arbitration Law of the State of New York contains the following provision:

> "Sec. 5. STAY OF PROCEEDINGS BROUGHT IN VIOLATION OF AN ARBITRATION AGREEMENT OR SUBMISSION. If any suit or proceeding be brought upon any issue otherwise referable to arbitration under a contract or submission described in section two, the supreme court, or a judge thereof, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under a contract containing a provision for arbitration or

under a submission described in section two, shall stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement" (L. 1920, Ch. 275; McKinney's Cons. Laws of N. Y., Book 3-A).

Summary of Argument

Preliminary. **Review of the cases construing the Federal, New York and English Arbitration Statutes, whether for or against the respondent's contentions, with particular reference to cases dealing with foreign arbitration clauses.**

Point I. **Even assuming that the arbitration clause of the agreement is exclusive, the stay was properly granted under Sec. 3 of the Federal Act.**

a. The granting of a stay would not be in disregard of the arbitration clause, but would make it effectual.

b. The language of Sec. 3 is comprehensive and clear and brings within its scope arbitration contracts whether or not they specify a particular place or law for the arbitration.

It may and should logically be applied without reference to the succeeding section of the Act providing for summary proceedings ordering arbitration.

If the decision of this case requires a construction of Section 4 of the Act, no practical difficulties of consequence arise in applying it to the facts in this case, and ordering arbitration under the contract.

Point II. **The language of the arbitration clause in the agreement does not warrant the construction that the parties selected the New York courts and statute to the exclusion of any action by the Federal courts.**

The language is merely permissive.

It should be construed with reference to the dominant intention of the parties, namely, to arbitrate.

It should be strictly construed as against a finding of intent to discriminate between Federal and State courts.

Point III. **As to petitioner's Specification of Errors 3 to 11, both inclusive (Petitioner's Brief, Points II, III and IV), the respondent rests upon the citations and reasoning in the opinion by the Circuit Court of Appeals.**

An arbitrable issue is presented.

The controversy lies within the provisions of the arbitration clause of the contract.

The respondent is not in default in proceeding with arbitration or guilty of any laches.

Argument

Decisions of the Federal Courts Construing the Federal Arbitration Act

The Federal Arbitration Act was passed in 1925. Section 15 of the Act provides that it shall not apply to contracts made prior to January 1, 1926. The act as to its general scope and purpose has been considered by this Court in an opinion by the Chief Justice, and its constitutionality upheld in *Marine Transit Corporation* v. *Dreyfus,* 284 U. S. 263; 76 L. Ed. 282. Its applicability to contracts providing for arbitration in a foreign jurisdiction has been construed in the lower courts. All of such cases had to do with arbitration clauses in charter parties calling for arbitration in London under the English law and were in Admiralty. No case has been found construing the Act where the contract called for arbitration under a State law to the exclusion of the Federal courts. It may be said in passing that such discrimination between the State

and Federal courts is abhorrent (Restatement of the Law of Contracts, American Law Institute, Vol. 2, p. 1064, Sec. 558) and that contracts should not be so construed unless such construction is inescapable.

These decisions of the lower courts are as follows:

The Silverbrook, 18 F. (2d) 144, D. C. Eastern District of Louisiana, 1927;

The Fredensbro, 18 F. (2d) 983, D. C. District of Pennsylvania, 1927;

The Beechwood, 35 F. (2d) 41, D. C. Southern District of New York, 1929;

Danielsen v. *Entre Rios Rys. Co.,* 22 F. (2d) 326, D. C. District of Maryland, 1927;

The Volsinio, 32 F. (2d) 357, D. C. Eastern District of New York, 1929.

In the *Silverbrook,* the charter party contained a London arbitration clause. One of the parties to the agreement brought suit *in rem,* and the respondent moved for *a stay* under Section 3 of the Federal Act. The court construed the Act to the effect that the sections other than Section 3 indicated the intention of the Congress to confine the operation of the whole Act to cases where specific performance of arbitration could be had "within the legitimate bounds of the territorial jurisdiction" (p. 147), of the Federal courts.

In the *Fredensbro,* the suit was one *in personam* and *in rem* by a British corporation against a steamship attached within the court's jurisdiction and a Danish corporation, the owner, held within the court's jurisdiction. The charter party contained a London arbitration clause. This arbitration clause *was pleaded as an exception to the jurisdiction of the court.* The court overruled the exception retaining jurisdiction, but saying (p. 985):

> "In view of the fact that the *res* is within the jurisdiction of the court, that the witnesses are within the jurisdiction, *that either party may avail itself in the suit of the arbitration clause in accordance with the United States Arbitration Act,* I fail to see any sound reason why the court should not take jurisdiction." (Italics ours.)

This would seem to be authority in our favor, because the court while retaining jurisdiction, (there was no application for a stay) leaves either party free to proceed under the United States Arbitration Act.

In *The Beechwood,* the charter party contained a London arbitration clause. Answering this action *in rem* the defendant pleaded the arbitration clause and moved to dismiss the suit. Judge Caffey struck out the defenses and refused dismissal on the ground that although the language of Section 2 of the Act (the validating clause) was broad enough to cover arbitration in London, the other sections providing for specific performance indicated that the Act was not intended to cover contracts calling for arbitration beyond the forum of the United States courts.

In *Danielsen* v. *Entre Rios Rys. Co.,* the suit was a libel *in personam* and the charter party contained a London arbitration clause. The respondent filed *exceptions to the jurisdiction* of the court, pleading the foreign arbitration clause. The court overruled the exceptions sustaining the jurisdiction of the court, but holding that a stay would be granted if applied for. Judge Coleman made a full analysis of the Federal Act, expressly disagreeing with the reasoning in the *Silverbrook* case, where a stay was denied, but agreeing with the opinion of the District Judge in the *Fredensbro* case. The court said (pp. 327-328):

"The effect of the act then seems to be that it requires the courts to stay trial, upon motion of one of the parties, until arbitration is had, and to order arbitration if, as provided in section 4, 'the hearing and proceedings under such agreement shall be within the district in which the petition for an order directing such arbitration is filed.' In other words, there is nothing in the Act which indicates that, although the arbitration provided for may be beyond the jurisdiction of the court, this shall forestall or in any way curtail jurisdiction which the court would normally have of maritime suits. On the contrary, as is seen from the language of the sections of the act above quoted, it is contemplated that the proceedings may be brought in the usual manner and jurisdiction over the arbitration assumed if the arbitration provided for is to take place within the court's jurisdiction; if not, then the proceedings shall be stayed until the foreign arbitration is perfected, whereupon the court has power to enter a decree upon the award. That is to say, the only limitation imposed upon the court is a stay pending the perfection of what cannot be accomplished within the jurisdiction of the court, and such a stay is to be clearly distinguished from prohibition against assumption of jurisdiction in the first instance.

This construction seems to be further borne out by the fact that the express purpose of the act is to deal with disputes in matters not merely of domestic, but of foreign, business, commerce 'with foreign nations,' which implies that the incident of such commerce which the act validates—that is arbitration—may occur in foreign places."

In *The Volsinio,* the proceeding was *in rem,* the charter party calling for arbitration in London. The contract had

to do with commerce between *two foreign nations.* The respondent applied for a stay under Section 3 of the Federal Act. Although the court denied the stay on the ground that commerce between two foreign states was not "commerce" as defined in the Arbitration Act, the Judge expressly disagreed with the decision in the *Silverbrook* case which, like *The Beechwood,* held that the Act did not validate contracts for arbitration outside the United States and agreed with the decision in *Danielsen* v. *Entre Rios Rys. Co.* The court held that it would have granted a stay although the charter party called for foreign arbitration, had the charter party concerned commerce between the United States and a foreign country, rather than commerce between two foreign countries.

Decisions Construing the New York Arbitration Act in Contracts Calling for Arbitration Outside New York

The New York Act became a law in 1920. Its constitutionality was upheld by this court in *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109 (68 L. Ed. 586) (1923), Judge Brandeis writing the opinion. The Federal statute enacted five years later employs almost identical language.

The New York Court of Appeals has not passed upon the application of the section of the statute providing for a stay where the contract called for arbitration outside the State, but the question has been before the lower courts.

The Court of Appeals, however, in *Matter of Marchant* v. *Mead-Morrison Mfg. Co.,* 252 N. Y. 284 (1929), in reviewing orders to arbitrate and appointing a third arbitrator, considered the general purpose and intent of the act, with some reference to contracts calling for arbitration in a particular locality outside the State. The arbitration

clause in question was construed as containing no implication of such exclusive selections of another law or place.

In *Lappe* v. *Wilcox*, 14 Fed. (2d) 861, District Court, N. D. New York, September 30, 1926, Judge Cooper refused to grant a stay under Section 5 of the New York Act, basing his decision on the ground that the statutes of the State of New York did not affect non-residents of the State who have the right denied to inhabitants of the State to invoke the jurisdiction of the Federal court. He held that the New York statute had the effect of impairing the rights and remedies of non-resident suitors entitled to resort to the Federal courts for redress, and that it was therefore ineffective as to such non-resident suitors. The Federal statute was not referred to. The contract in that case had been made long before the Federal statute was passed.

In *Matter of Inter-Ocean Food Products, Inc.*, 206 App. Div. 426, First Dept., 1923, there was an original application (no suit was pending) to compel one of the parties to a contract to arbitrate in California as provided in a clause of the agreement in controversy. The lower court entered a decree directing the parties to arbitrate in California in accordance with their agreement. After reviewing the English cases and construing them to hold that under the English Act a stay would be granted in a suit involving a foreign arbitration clause, the Appellate Division reversed the court below, denying specific performance of the contract. The appellate court held, however, that in a suit upon the contract a stay would be granted under the New York Act, saying at page 433:

> "I am of the opinion that while an agreement to arbitrate in a foreign jurisdiction and before a foreign arbitrator, is not invalid or illegal, it cannot

> be enforced as between citizens of this state who are parties thereto by compelling them to go without the state in a foreign jurisdiction and before a foreign tribunal there to arbitrate their disputes. I am also of the opinion that the only remedy available under such circumstances in the courts of this state, is to stay the trial of an action here by the party who has refused to carry out the agreement to arbitrate and who seeks the aid of our courts to enforce his claim therein. Such a stay may clearly be given under the provisions of Section 5 of the Arbitration Law."

In *Kelvin Engineering Company Inc.* v. *Alfredo Blanco and others,* 125 Misc. 728, 1925, a suit had been brought to recover damages in the sum of $700,000 upon a contract containing a clause as follows:

> "The parties hereto submit themselves to the courts of the City of San Diego, Cuba, whether on questions relating to performance or non-performance of this contract, expressly renouncing their right to litigate in any other place" (p. 731).

The court said at page 731:

> "Unquestionably this court cannot direct parties to proceed to submit their controversy to the courts of another jurisdiction but it may by virtue of Section 5 of the Arbitration Act, stay the trial in this forum until such arbitration has been had in accordance with the terms of the agreement." Citing *Matter of Inter-Ocean Food Products, Inc., supra,* and, *Mittenthal* v. *Mascagni,* 183 Mass. 19.)

Referring to the English and Massachusetts authorities, the court said (p. 733):

> "I am in accord with these views. It would be too strict and narrow a limitation of the intention of the parties expressed to hold that an agreement to submit to courts of foreign jurisdiction should not be treated as a submission to arbitration within the purview of the Arbitration Law."

The stay was granted.

In *Matter of Hamburg-American Line,* 135 Misc. (N. Y.) 715, 1930, affirmed without opinion, 228 A. D. 802, however, the court of first instance expressly disagreed with the *Kelvin* case, declining to grant a stay where the contract sued upon contained a provision that all disputes were to be decided according to the German law in the Hamburg courts. The *Inter-Ocean Food Products Co.* case was not referred to in the only opinion rendered—that in the lower court.

Decisions of the English Courts Construing the English Act Where the Contract Called for Arbitration Outside the Jurisdiction of the British Courts

It appears that under the English Act, the word "submission" is used to describe clauses in commercial contracts calling for the arbitration of future disputes arising thereunder. While the phraseology of the Act (passed in 1889) is somewhat different from that used in the Federal and New York Acts, the substance and the procedure is substantially the same. The Arbitration Act of 1889 (52 and 53 Vict. C. 49) Section 1, provides:

> "Submission unless contrary intention is expressed therein shall be irrevocable * * * and shall have the same effect in all respects as if it had been made an order of the court."

Section 4 corresponding to Section 3 of the Federal Arbitration Act and Section 5 of the New York Act, provides as follows:

> "If any party to a submission * * * commences any legal proceedings in any court * * * any party to such legal proceedings may at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay proceedings * * *."

The Act contains no specific provision for an order directing arbitration. The "submission", that is the agreement to arbitrate, is declared to "have the same effect in all respects as if it had been made an order of the Court."

In *Law* v. *Garrett*, L. R. 8 Ch. Div. 26 (C. A. 1878) the parties had agreed in their contract to refer all disputes to the St. Petersburg Commercial Court or its successor. The plaintiff sued in England and the defendant moved for a stay, pleading the arbitration clause of the contract. The court granted the stay, holding that courts have a *prima facie* duty to support an agreement to arbitrate. The decision was before the passage of the arbitration act but the English Common Law Procedure Act conferred upon the court the power to stay proceedings upon being satisfied that no reason existed for not referring a matter to arbitration.

In the following cases the courts granted a stay under Section 4 of the English Act where actions had been brought on contracts containing clauses providing for arbitration abroad or for the submission of all controversies to foreign courts. *Austrian Lloyd Steamship Co.* v. *Gresham Life Assurance Society, Limited*, L. R. (1903), 1 K. B. 249 (Court of Appeal); *Kirchner* v. *Graban*,

(1909) 1 Ch. Div. 413; *The Cap Blanco,* (1913) Pr. Div. 130 (Court of Appeal).

POINT I

Even assuming that the arbitration clause of the agreement is exclusive, the stay was properly granted.

(a). *The granting of a stay would not be in disregard of the arbitration clause, but would make it effectual.*

The position of the petitioner comes to this: It claims to have exclusively selected the New York statute and laws for the sanction and enforcement of the arbitration clause. In derogation of its general agreement to arbitrate, it brings an action for breach of the contract, selecting the Federal court for that purpose. The bringing of the action is in itself a breach of the contract to arbitrate. *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109 (68 L. Ed. 582) (1924); citing *Haggart* v. *Morgan,* 5 N. Y. 422, 427; 55 Am. Dec. 350. Having brought the defendant into the Federal court (in itself a breach of the contract and certainly contrary to its own claim that it has selected the New York courts for the settlement of any controversy arising out of the performance of the contract), it now insists that the Federal court has no power to give effect of any kind to the agreement it has made. Such deliberate evasion of its own promise it supports by contending that to grant a stay would be to make a new contract for the parties because it could only be granted under the Federal Act, and the parties have exclusively adopted

the New York statute and none other. As part of this contention is the further idea (inherent) that since the parties have selected the New York courts, no other court can recognize or give any effect to the arbitration clause. Even the granting of a stay would, petitioner claims, be making a new contract for the parties.

The Circuit Court of Appeals did not discuss this contention. It does not seem to be covered by petitioner's specification of errors (Petition for writ, pp. 16-17) but is argued at length in petitioner's brief.

It seems to us that exactly the contrary is true. Assuming the narrow interpretation of this clause asserted by the petitioner, all the Federal court is asked to do is to step aside and permit the parties to carry out the agreement to arbitrate under the supervision of the New York courts,—an agreement which the petitioner insists it made, but now wishes to avoid. This would not be making a new agreement for the parties. The granting of a stay would give effect to the agreement which petitioner insists the parties have validly made.

The petitioner further contends that Section 3 of the Federal Arbitration Act, 9 U. S. C. A. (United States Arbitration Act § 3) does not authorize a stay where the arbitration must take place beyond the jurisdiction of the Federal court and under the law of a different forum (Petition for writ, p. 16; Pet. brief, p. 17).

(b) *The provisions of the Act are clear and cover the instant case.*

Section 3 of the Act is as follows:

> "Sec. 3. STAY OF PROCEEDINGS WHERE ISSUE THEREIN REFERABLE TO ARBITRATION. If any suit

> or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration (Feb. 12, 1925, c. 213, Sec. 3, 43 Stat. 883)."

This is broad language and clearly covers the case. The only question is whether or not the construction of the statute as a whole requires a narrow construction of Section 3.

The judicial functions under the Act are two-fold: (1) the granting of stays under Section 3 where suits are brought under agreements in derogation of an arbitration clause which is a part of the agreement; and (2) the entertaining by the court of a new kind of special summary proceeding, viz.: a proceeding brought for the specific performance of an agreement to arbitrate.

There may be inherent in the subject matter of the latter proceeding practical difficulties which confine such proceeding to a limited field, and to that extent compel a narrower construction as to the scope of that part of the Act. This presents the question of whether or not this limited view must be taken as to the scope of the provision which directs the granting of the stay. We believe that it does not.

The provision of Section 3 relating to the stay constitutes no new grant of judicial power. No doubt the courts,

as a part of their inherent power to control suits which are pending before them, have always had the discretionary power to grant stays. The judicial doctrine that a stay would not be granted for the reason that the suit was brought in derogation of agreements to arbitrate did not rest upon a question of lack of power to do so. Such doctrine rested upon the judicial conception of policy that parties by their agreements should not foreclose their right of recourse to the courts.

The act of Congress in passing the Arbitration Act and especially Section 3 thereof is in this respect a declaration of a new policy to be followed by the courts. Even if the judicial power had not always been inherent in the court to grant stays, the power of Congress under the Constitution to constitute the Federal courts and define their jurisdictional powers, would clearly authorize Congress either by an amendment of the Judiciary Act or in the form of the Arbitration Act to empower the courts to do so, and as above indicated there is no room for the conception that the courts could not in any suit pending before the court grant a stay.

If Congress had merely adopted Section 3 without as a part of the same Act authorizing the special proceeding for the specific enforcement of arbitration agreements, there would not be the least room for the argument that Section 3 was limited in its scope. We submit that the fact that the other part of the Act authorizing the summary special proceeding for specific performance may have to be confined to a narrower field is no reason for narrowing the construction of Section 3.

It is apparent from the opinion of the Circuit Court of Appeals that that court had in mind practical considerations and also the language of the Act which might require

the provision as to specific performance to be applied in a narrower field. The court, in construing Section 3 and giving it a broad application, treated Section 3 as a thing apart from the other part of the statute, and we submit that the court was quite correct in doing so.

If the decision of the case should require it, we think that the court below could have gone farther and could have held in the instant case that the provision to arbitrate could be specifically enforced in the Federal court. We say this still assuming that the arbitration clause is exclusive.

The cases which have held that courts would not enforce agreements for a foreign arbitration have rested their determination primarily upon the following language contained in Section 4 of the Act:

> "The hearing and proceedings under such agreement shall be within the district in which the petition for an order directing such arbitration is filed."

Professor Sturges in his book entitled "Commercial Arbitration and Awards", at page 934, discusses the meaning of these words, with relation to their context.

He observes that to construe these words as disabling the Courts from ordering foreign arbitration, nullifies two distinct provisions of the same section, namely that the orders provided for therein shall direct the parties to proceed to arbitration *in accordance with the terms of the agreement.* He deems it more reasonable to take the sentence as intended to mean that the proceeding shall be within the district in which the petition is filed, when the arbitration agreement does not specify any particular place where the arbitration shall be held.

We are not unmindful that practical difficulties may seem to exist in specifically enforcing an agreement for

foreign arbitration, but we believe that these difficulties are not as real as they may seem to be.

An order specifically directing the parties to arbitrate primarily determines that there is an arbitration clause in the agreement which is entitled to judicial recognition as an obligation, and that one of the parties is in default in proceeding under it. In a word, it adjudicates a status. If, after such an order to proceed to arbitration in respect of a clause in the agreement to have the arbitration, for example, in London, the party obtaining the order should proceed before London arbitrators and take his award in default of the other party's submission, there would seem to be no difficulty in the giving effect to that award by this court to the same extent as if it were under an arbitration proceeded upon here. While the courts speak of the practical difficulties surrounding "supervision" by the court under such circumstances, the difficulty may be again overstated, for it is hard to see just wherein the necessity for supervision lies.

In the instant case, however, none of these difficulties, however real they may be, can apply. In *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109 (68 L. ed. 582), Judge Brandeis said:

> "The substantive right created by an agreement to submit disputes to arbitration is recognized as a perfect obligation."

As a matter of substantive law such an agreement is entitled to recognition as a legal obligation implying complementary legal rights. Since the only questions remaining are questions concerning procedure and since the procedural rights under the New York statute and under the Federal

statute are virtually identical, the procedural difficulties would seem to disappear.

Even giving to the language of Section 4 above quoted its narrowest construction, it would only mean that the power of the court to act is restricted to cases in which the arbitration hearings were to be held within the territorial jurisdiction of the court. Giving also to the arbitration clause of the agreement the narrowest construction, that agreement contemplates that the arbitration hearings may be held within the territorial jurisdiction of the United States District Court for the Southern District of New York and there is no procedural difficulty or practical difficulty involved. The Federal court, acting within the narrowest construction of the statute, may do as well as the New York court in selecting arbitrators if such selection be necessary and in supervising the conduct of the arbitration.

Whatever the limitations upon the exercise of the power conferred by the statute upon the courts to enforce specifically the arbitration clause, we submit again that they constitute no limitation upon the power of the court to grant a stay or the court's duty to follow the direction of the Act in granting a stay where suit has been brought in that court in derogation of the arbitration clause.

The petitioner invoked the jurisdiction of the United States District Court by bringing this suit in that court in derogation and violation of the agreement to arbitrate. The petitioner claims that, notwithstanding that he has thus invoked the jurisdiction of this court, the parties have exclusively chosen the New York court. We submit that, having come into the Federal court, the petitioner must submit to the Federal law and that the defendant is entitled

as a clear matter of right to the stay which the Act of Congress directs the Federal courts to grant under such circumstances.

POINT II

The language of the arbitration clause in the agreement does not warrant the construction that the parties selected the New York courts and statute to the exclusion of any action by the Federal courts.

The clause is as follows:

> "TENTH: In case any dispute should arise between the Buyer and the Seller as to the performance of any of the terms of this agreement, such dispute shall be arbitrated and the cost thereof shall be borne equally by both parties. The Buyer and the Seller shall each appoint one arbitrator and the two arbitrators so appointed shall select a third arbitrator and the decision of a majority of the three arbitrators shall be final and conclusive on both parties. In case for any reason any such arbitration shall fail to proceed to a final award, either party may apply to the Supreme Court of the State of New York for an order compelling the specific performance of this arbitration agreement in accordance with the arbitration laws of the State of New York."

The language is permissive. It describes what may be done in the event that arbitration should fail to proceed to a final award. The parties naturally had in mind the New York statute and the New York courts, for the contract was made in New York, both parties were engaged

in business in New York (R. 5), and the coal was to be there delivered. Their dominant intention was to provide for arbitration and strengthen that purpose by referring to the law in the State where they were and where full effect would be given to such an agreement. The idea of excluding all other jurisdictions was obviously not present. Had it been they would have used language indicating such an intention by using words of exclusion such as are employed in foreign arbitration clauses. No case has been found, except in *Matter of Marchant* v. *Mead-Morrison Mfg. Co.*, 252 N. Y. 284 (1929), hereinafter referred to, where the courts have found it necessary to construe such a clause as to whether it was intended to be exclusive. Such intention is easy to express.

The motive for selecting a foreign jurisdiction where one of the parties is a resident there or transacting business there, is obvious. Where the parties are residents and citizens of the United States, a motive for such a preference as between State and Federal courts, particularly where the laws concerned are identical, seems entirely lacking. In the usual foreign arbitration clauses, the words "shall" and "must" are generally employed, which leaves no room for doubt.

The District Court, however, construed the clause to be exclusive although considering that "it is somewhat in- [illegible] (R. 32). The Court of Appeals refrained from construing the clause, saying that "it is certainly possible to read the language only as an addition, redundant because already provided by law, and as not intended to prevent arbitration elsewhere" (R. 75).

It is possible to find some degree of exclusiveness in the language without construing the clause so strongly as to find the intention to exclude an American court having

concurrent jurisdiction from staying an action to the end that arbitration may proceed.

In *Matter of Marchant* v. *Mead-Morrison Mfg. Co.*, 252 N. Y. 284 (1929), the parties had entered into a contract in Boston for the sale of tractors to be delivered there. The contract contained a general arbitration clause providing for the appointment of an arbitrator by each, the two so appointed to choose a third. In the progress of a suit in New York, in which arbitration had been ordered, the arbitrators selected failing to appoint a third, the court appointed a third arbitrator as provided by the New York statute. The final issue was whether the court had power so to do in view of the provisions of the arbitration clause in the contract calling for the selection of the third arbitrator by the other two. The New York Court of Appeals sustained the order of the court below, construing the contract so as to give effect *to the dominant intention of the parties, namely, to arbitrate.* In its opinion the court, referring to the general rule that in construing contracts effect should be given to the dominant intention of the parties, said (p. 295):

> "Contracts to submit to arbitration must answer to like tests, elusive though they be. There may be a dominant intention to arbitrate at all events, the machinery of selection being merely modal and subordinate. If so the failure of the means will not involve as a consequence the frustration of the end. Equity will give specific performance of the principal engagement with variations of method appropriate to the facts."

Again referring to the construction of arbitration agreements, the court referring to the parties to such agreements said (p. 303):

> "They are not to be trapped by a strained and unnatural construction of words of doubtful import into an abandonment of legal remedies, unwilled and unforeseen."

These observations seem to us to fit the instant case. To construe the arbitration clause as debarring a Federal court from granting a stay would frustrate the dominant purpose of the parties, that is, to arbitrate. It would seem that by such a construction the parties would indeed be "trapped into an abandonment of legal remedies" (those provided by the Federal Arbitration Act and available to the court into which the defendant has been brought) "unwilled and unforeseen."

The selection of a *foreign* jurisdiction for the determination of all disputes by the parties, one of whom is a resident, has received frequent criticism in the courts. Enforcement of agreements selecting the State courts rather than the Federal courts, or Federal courts rather than State, has been decried, and indeed such discrimination and preference has been declared invalid and unenforceable (Restatement of the Law of Contracts, American Law Institute, Vol. 2, Sec. 558). Reference to this Restatement is made without fear that this or any court will hold the *general agreement to arbitrate* invalid, although it might well refuse to give effect to that part of it which is discriminatory as to the courts in which the arbitration may proceed—if the parties are deemed to have made such exclusive selection. If such an exclusive discrimination between the State and Federal courts is abhorrent to the courts, and perhaps invalid, contracts will certainly be strictly construed against such intent.

POINT III

As to petitioners's Specification of Errors 3 to 11, both inclusive (petitioner's brief, Points II, III, IV), respondent rests upon the citations and reasoning in the opinion by the Circuit Court of Appeals.

An arbitrable issue is presented. The controversy lies within the provisions of the arbitration clause of the contract. The respondent is not in default in proceeding with arbitration or guilty of any laches.

CONCLUSION

The order of the Circuit Court of Appeals should be affirmed with costs.

New York, November 30th, 1934.

Respectfully submitted,

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